DISTRIBUTED
NOV 10 1992

ORIGINAL

ORIGINAL

NO. 92-579 (2)

Supreme Court, U.S.
FILED
NOV 2 1992
OFFICE OF THE CLERK

IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1992

JAMES BLODGETT, GARY EDWARDS,
EDITH JONES, RON VAN BOENING,
JACK LAMBERT, AND LAWRENCE KINCHELOE,

Petitioner,

V.

ROGACIANO GONZALES MENDOZA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

MAUREEN E. LAFLIN
Counsel of Record

University of Idaho
College of Law
Legal Aid, Room 10
Moscow, Idaho 83843
(208) 885-6541

RECEIVED
OFFICE OF THE CLERK
SUPREME COURT, U.S.

43 pp

TABLE OF CONTENTS

page

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE. 1

I. Nature of the Case and Course of Proceedings. 1

II. Relevant Facts. 4

ARGUMENT 6

I. THE NINTH CIRCUIT COURT OF APPEALS CORRECTLY APPLIED *HEWITT V. HELMS* AND *KENTUCKY DEPARTMENT OF CORRECTIONS V. THOMPSON* AND PROPERLY FOUND THE FECES WATCH POLICY AND THE VISITATION POLICY CREATED CONSTITUTIONALLY PROTECTED LIBERTY INTERESTS. 6

II. NEITHER THE AMOUNT OF OFFICIAL DISCRETION ALLOWABLE UNDER *HEWITT V. HELMS* , NOR QUESTIONS REGARDING PROCEDURAL REGULATIONS AND BOILERPLATE LANGUAGE IN PRISON REGULATIONS ARE RELEVANT TO THIS CASE. 11

A. The Ninth Circuit's Decision In *Mendoza v. Blodgett* Falls Under The Rule Of *Olim v. Wakinekona* Which Clarified The Amount Of Official Discretion Allowable Under *Hewitt v. Helms* 11

B. While Liberty Interests May Properly Be Defeated By Mere Procedural Regulations Or Boilerplate, Disclaimer Language,The Regulations At Issue In *Mendoza v. Blodgett* Contained No Such Language. 14

III. THE RULE SET FORTH IN *HEWITT V. HELMS* AND *KENTUCKY DEPARTMENT OF CORRECTIONS V. THOMPSON* IS NOT LIMITED TO PRISON REGULATIONS AFFECTING THE DURATION OF, OR RELEASE FROM, CONFINEMENT IN PRISON. 16

CONCLUSION 23

APPENDIX

A. Institutional Order (IO) 09.053 (Feces Watch Procedures). A-1

B. Insitutional Order (IO) 16.020 (Inmate Visiting) . . B-1

C. Washington Administrative Code (WAC) 275-80-930. . . C-1

TABLE OF AUTHORITIES

CASES

page

Doe v. Sullivan County, Tenn., 956 F.2d 545 (6th Cir. 1992) 13

Dorman v. Thornburgh, 955 F.2d 57 (D.C. Cir. 1992) 21,22

Gittens v. LeFevre, 891 F.2d 38 (2d Cir. 1989) 19

Hewitt v. Helms, 459 U.S. 460 (1983) . . . . . passim

Kentucky Department of Corrections v. Thompson, 490 U.S. 454 (1989) . . . . . passim

Layton v. Beyer, 953 F.2d 839 (3rd Cir. 1992) 19,20

Meachum v. Fano, 427 U.S. 215 (1976) 7

Mendoza v. Blodgett, 960 F.2d 1425 (9th Cir. 1992) . . . . . passim

Olim v. Wakinekona, 461 U.S. 238 (1983) 12,13

Sheley v. Dugger, 833 F.2d 1420 (11th Cir. 1987) 19,20

Smith v. Shettle, 946 F.2d 1250 (7th Cir. 1991) 14,15

Wallace v. Robinson, 940 F.2d 243 (7th Cir. 1991) 21

Williams v. Armontrout, 852 F.2d 377 (8th Cir. 1988), *cert. denied*, 488 U.S. 996 (1988) 21

Williams v. Kyler, 680 F.Supp. 172 (M.D.Pa. 1986), *aff'd.*, 845 F.2d 1018 (3rd Cir. 1988) 15

STATUTES AND CONSTITUTIONAL PROVISIONS

42 U.S.C. Section 1983 1

Washington Administrative Code (WAC) 275-80-930 6,10,11-12

OTHER AUTHORITIES

U.S. Constitutional Amendment XIV Section 1 7

Institutional Order (IO) 09.053 . . . . . passim

Institutional Order (IO) 16.020 . . . . . passim

IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1992

JAMES BLODGETT, GARY EDWARDS,
EDITH JONES, RON VAN BOENING,
JACK LAMBERT, AND LAWRENCE KINCHELOE,

Petitioner,

V.

ROGACIANO GONZALES MENDOZA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondent Rogaciano Gonzales Mendoza respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Ninth Circuit's opinion in *Mendoza v. Blodgett,* 960 F.2d 1425 (1992).

STATEMENT OF THE CASE

I. Nature of the Case and Course of Proceedings.

Respondent Rogaciano Gonzales Mendoza ("Mendoza"), who was aligned as Plaintiff below, filed the instant civil rights action on or about December 5, 1989, pursuant to 42 U.S.C. Section 1983. Mr. Mendoza is an inmate at the Washington State Penitentiary ("WSP") at Walla Walla,

Washington. Petitioners ("the State"), who were aligned as Defendants below, were administrators at Washington State Penitentiary. They include: James Blodgett, former Superintendent, WSP; Gary Edwards, Correctional Lieutenant, WSP; Edith Jones, Corrections Officer, WSP; Ron Van Boening, Associate Superintendent, WSP; Jack Lambert, Associate Superintendent, WSP; and Lawrence Kincheloe, former Director of the Division of Prisons, Washington State Department of Corrections.

Mr. Mendoza sued the defendants for depriving him of his due process rights in regard to the implementation of two WSP policies: (1) the Feces Watch[1] policy; and (2) the visitation policy. Mr. Mendoza alleged that the State deprived him of certain basic Constitutional rights under the First, Fourth, Fifth, Eighth, Ninth and Fourteenth Amendments of the United States Constitution. *Mendoza v. Blodgett*, 960 F.2d 1425,1427 (9th Cir. 1992).

Defendants and Plaintiff filed respective motions for summary judgment. On December 21, 1990, the District Court granted summary judgment in favor of the Defendants on all issues except Plaintiff's due process claims. The district court requested supplemental briefing on the due process

[1]Feces Watch or dry cell watch refers to a procedure governed by a policy which directs the Superintendent or his designee, upon reasonable suspicion that an inmate is secreting contraband, to place the inmate in a custody-locked cell in the WSP Hospital, in which water to the cell is turned off, for the purpose of examining at least three consecutive bowel movements for the presence of contraband.

issues. Subsequently, on February 7, 1991, the court granted summary judgment in favor of Defendants on Plaintiff's due process claims.

The court's order granting summary judgment stated that the WSP Feces Watch and visitation policies created protected liberty interests. However, the court determined the Defendants were entitled to qualified immunity. *Mendoza*, 960 F.2d at 1427.

Plaintiff appealed the district court's dismissal of his due process claims. The Defendants cross-appealed the finding of state created liberty interests under the Feces Watch policy and the visitation regulations. *Mendoza*, 960 F.2d at 1427.

On appeal, the Ninth Circuit Court of Appeals affirmed the decision of the district court. The Court of Appeals found that the Feces Watch policy and the visitation policy granted Mr. Mendoza state created liberty interests because the language of the regulations contained substantive predicates and mandatory language, as required by *Hewitt v. Helms*, 459 U.S. 460, 472 (1983) and *Kentucky Department of Corrections v. Thompson*, 490 U.S. 454, 463 (1989).

Additionally, the court found the hearing conducted five days after the completion of the watch insufficient to accord Mr. Mendoza due process. However, the court held the Defendants were entitled to qualified immunity. *Mendoza*, 960 F.2d at 1429-31. The court found the suspension of

visitation privileges and informal infraction hearing did not violate procedural due process. *Id.* at 1432-33.

II. Relevant Facts.

On September 29, 1989, Mrs. Mendoza and their six children visited Rogaciano Mendoza in the visiting room of the Washington State Penitentiary (WSP). Correctional Officer Edith Jones monitored the visit from the floor of the visiting room and Correctional Officer Larry Brown watched from the visiting room security booth. The Mendoza children requested use of the restroom facilities at approximately 6:45 p.m.. After unlocking the door to the hallway which led to the restroom, Officer Jones prepared to escort the children to the restroom. Officer Jones then noticed a balloon on the floor with the tip bitten off and covered with a white, slimy substance. Officer Jones informed her supervisor of what she had found. The supervisor informed Associate Superintendent Lambert of the situation. *Mendoza,* 960 F.2d at 1427.

Lambert believed that there was reasonable suspicion that Mr. Mendoza may have ingested a similar balloon or its contents based on Lambert's knowledge of common methods used to smuggle contraband into penal institutions. Lambert authorized placement of Mr. Mendoza in Feces Watch. *Id.* at 1427.

The Feces Watch procedures, which are listed in WSP's Institutional Order ("IO") 09.053 (Appendix A), allow for an

inmate to be placed on dry cell watch after a correctional officer has determined that there is "reasonable suspicion" that the inmate is secreting contraband. The procedures are designed to examine inmates' fecal samples for contraband.

Mr. Mendoza was placed on Feces Watch at 8:40 p.m. on September 29, 1989. Mr. Mendoza was placed in a hospital cell, strip searched, and given a clean pair of shorts. He was required to sleep on a mattress on the floor without a blanket. He defecated five times during that 24 hour period. Officers carefully examined each bowel movement and found no contraband. A full day later, at 8:40 p.m. on September 30, 1989, Mr. Mendoza was released from the dry cell. *Id.* at 1428.

The charge against Mr. Mendoza of attempting to smuggle illegal contraband into the Institution was heard on October 5, 1989. The hearing board found Mr. Mendoza guilty of the infraction. However, nearly a month later on November 3, Superintendent Blodgett reviewed the infraction and dismissed it. He determined that although the officers had reasonable suspicion to place Mr. Mendoza on Feces Watch, there was a lack of proof of Mr. Mendoza's direct involvement. Nevertheless, Superintendent Blodgett, relying on WSP's visitation policy, IO 16.020 (Appendix B), suspended Mr. Mendoza's visiting privileges with his wife and children for 90 days. *Mendoza,* 960 F.2d at 1428.

The visitation policy lists nine specific circumstances under which an inmate's visitation rights can be suspended. Washington Administrative Code (WAC) 275-80-930 (Appendix C) requires that an inmate be found "guilty" of an infraction before visitation privileges can be suspended. When privileges are suspended, written notice shall be given. Officials notified Mr. Mendoza and his wife of their suspended visitation. Reinstatement of Mr. Mendoza's regular contact visits with his family began in February 1990.

ARGUMENT

I. THE NINTH CIRCUIT COURT OF APPEALS CORRECTLY APPLIED *HEWITT v. HELMS* AND *KENTUCKY DEPARTMENT OF CORRECTIONS V. THOMPSON* AND PROPERLY FOUND THE FECES WATCH POLICY AND THE VISITATION POLICY CREATED CONSTITUTIONALLY PROTECTED LIBERTY INTERESTS.

The Ninth Circuit applied the rule of *Hewitt v. Helms,* 459 U.S. 460, 472 (1983), and *Kentucky Department of Corrections v. Thompson,* 490 U.S. 454, 463 (1989), and properly held that the language of the regulations governing Feces Watch and visitation created liberty interests. The Ninth Circuit found the mandatory language and the substantive predicates in IO 09.053 (Appendix A), IO 16.020 (Appendix B) and WAC 275-80-930 (Appendix C). The court recognized that these regulations granted Mr. Mendoza protected state created liberty interests in remaining in

the general prison population and in maintaining uninterrupted visits with his wife and children.

The rule this Court set forth in *Hewitt v. Helms,* 469 U.S. at 472, and again in *Kentucky Department of Corrections v. Thompson, 490 U.S.* at 463, is clear: substantive predicates and mandatory language contained within state law create a liberty interest protected by the Fourteenth Amendment.

The Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property without due process of law." U.S. Const. amend. XIV, Sec. 1. This Court holds that liberty interests protected by the Fourteenth Amendment may arise from two sources--the Due Process Clause itself or state law. *Hewitt v. Helms*, 459 U.S. at 466; *Meachum v. Fano*, 427 U.S. 215, 223-227 (1976).

State's most commonly create liberty interests by establishing "substantive predicates" to govern official decisionmaking and by mandating the outcome to be reached upon a finding that the relevant criteria have been met. *Kentucky Department of Corrections v. Thompson*, 490 U.S. at 462 (quoting *Hewitt*, 469 U.S. at 472). Language of "unmistakably mandatory character" must be used in the regulations. *Hewitt*, 459 U.S. at 471. Furthermore, in *Kentucky Department of Corrections* this Court stated: "The search is for *relevant* mandatory language that expressly requires the decisionmaker to apply certain substantive

predicates in determining whether an inmate may be deprived of the particular interest in question." 490 U.S. at 464 n.4.

To summarize *Hewitt*, statutes and regulations governing daily operation of a prison system have never conferred any liberty interest *in and of themselves*. 459 U.S. at 469 (citing *Meachum v. Fano*, 427 U.S. 215 (1976)). However, where a state goes beyond the simple procedural guidelines, and uses mandatory language and specifies substantive predicates, the state creates a protected liberty interest. *Hewitt*, 459 U.S. at 471-72.

The Ninth Circuit recognized in this case that Washington created protected liberty interests by adopting regulations containing mandatory language and substantive predicates to govern official decisionmaking at the Washington State Penitentiary. *Mendoza v. Blodgett*, 960 F.2d at 1428-29. The court applied this rule to both the Feces Watch procedure and to visitation regulations at issue in *Mendoza*.

Under the Feces Watch procedure, the court found substantive predicates in IO 09.053(V): "[a]n inmate will be placed upon Feces Watch only upon determination that there is reasonable suspicion that a suspected inmate is currently secreting contraband." The Feces Watch Procedure defines reasonable suspicion as follows:

> Reasonable Suspicion: Shall be individualized suspicion which is based upon specific objective facts in conjunction with rational inferences which Correctional Staff would be entitled to make based upon their judgment and experience and which reasonably warrants suspicion that an inmate is secreting contraband. Individualized suspicion shall be specifically directed to the person who is the target of the search, which will be documented.

IO 09.053(IV). (Appendix at A-1).

Additionally, the Ninth Circuit found that IO 09.053(V) contained the requisite mandatory language because the "decisionmaker must decide whether to place a prisoner on a dry cell watch by determining if reasonable suspicion exists." *Mendoza,* 960 F.2d at 1429. The regulation calls for a two-step process. First, the superintendent or his designee must determined whether a reasonable suspicion exists. If it does, then the second step is to place the inmate on Feces Watch and follow the listed procedures.

A protected liberty interest is created because the substantive predicates and mandatory language give the superintendent no discretion but to follow Feces Watch procedures once he determines that there is reasonable suspicion that an inmate is secreting contraband. 960 F.2d at 1429. In other words, an inmate cannot be placed in the dry cell watch for any reason or no reason at all; an inmate may expect he will not be placed on dry cell watch in the absence of "reasonable suspicion" that he is secreting contraband.

The Ninth Circuit also correctly applied *Hewitt* when it found WSP's visitation regulations created a liberty interest. IO 16.020(VI)C (Appendix at B-8), which provides an *enumerated list of circumstances* under which a visit can be denied or visiting privileges can be suspended, provides the substantive predicates. Additional substantive predicates are contained in Washington Administrative Code Sec. 275-80-930 (Appendix C-1), which provides that visiting rights of the prisoner may be suspended "only after a *finding of guilt" pursuant to a regular disciplinary hearing*. *Mendoza*, 960 F.2d at 1432. (emphasis added).

WAC 275-80-930 also contains the requisite mandatory language: suspension of visiting privileges may occur "*only after* a finding of guilt." (Appendix at C-1). As the court stated: "Thus, an inmate may reasonably form an objective expectation that visiting privileges will not be suspended without compliance with the applicable rules." *Mendoza*, 960 F.2d at 1433 (citing *Kentucky Deptartment of Corrections*, 490 U.S. at 464-65).

As such, Mr. Mendoza has a protected liberty interest in maintaining uninterrupted visits with his wife and children. The overall effect of the regulations enables Mr. Mendoza to form a reasonable expectation that his wife and children will be allowed to visit absent the occurrence of any of the conditions listed in the regulations.

Thus, the Ninth Circuit Court of Appeals correctly applied the rule set forth in *Hewitt v. Helms* to both the Feces Watch and the visitation procedures. The state went beyond mere procedural guidelines and used substantive predicates and mandatory language to create. Mr. Mendoza, therefore, has protected liberty interests. Therefore the State's petition should be denied.

II. NEITHER THE AMOUNT OF OFFICIAL DISCRETION ALLOWABLE UNDER *HEWITT V. HELMS*, NOR QUESTIONS REGARDING PROCEDURAL REGULATIONS AND BOILERPLATE LANGUAGE IN PRISON REGULATIONS ARE RELEVANT TO THIS CASE.

A. The Ninth Circuit's Decision In *Mendoza v. Blodgett* Falls Under The Rule Of *Olim v. Wakinekona* Which Clarified The Amount Of Official Discretion Allowable Under *Hewitt v. Helms*.

The regulations at issue in this case, IO 09.053, IO 16.020, and WAC 275-80-930, eliminated official discretion regarding Feces Watch and visitation. *Mendoza v. Blodgett*, 960 F.2d at 1429, 1432-33. For example, IO 09.053 provides a mandatory two-step process: if prison officials determine that reasonable suspicion exists, then the officials must place the inmate in Feces Watch and follow the listed procedures. Similarly, WAC 275-80-930 provides that the visitation rights of an inmate charged with a violation of the visiting rules (set forth in IO 16.020) may *only* be

suspended after a finding of guilt in a regular disciplinary hearing.

The State contends that confusion exists as to whether *Hewitt* requires the elimination or just limitation of official discretion. While Respondent finds no such confusion, even if any exists, it is irrelevant to this case. As noted above, the Ninth Circuit found the regulations at issue in this case eliminate official discretion. Yet even if the regulations do not eliminate discretion, but only substantively limit it, this would still be consistent with this Court's holding in *Olim v. Wakinekona,* 461 U.S. 238, 249 (1983).

Olim v. Wakinekona, which was decided shortly after *Hewitt,* held that a state "creates a protected liberty interest by placing substantive limitations on official discretion." 461 U.S. at 249. Further this Court wrote: "If the decisionmaker is not 'required to base its decisions on objective and defined criteria,' but instead 'can deny the requested relief for any constitutionally permissible reason or for no reason at all,' the State has not created a constitutionally protected liberty interest." *Id.* at 249 (citing *Connecticut Board of Pardons v. Dumschat,* 452 U.S. 458, 467 (1981)).

Therefore, the Ninth Circuit's opinion in *Mendoza* falls within the rule of *Olim*. As such, the question regarding the quantity of official discretion allowable is irrelevant.

In support of its contention that the *Hewitt* rule has received inconsistent application, the State cites the Sixth Circuit Court of Appeals' decision in *Doe v. Sullivan County, Tenn.*, 956 F.2d 545 (1992). In *Doe*, the Sixth Circuit found that substantive predicates which limit discretion are sufficient to create a liberty interest. All official discretion need not be eliminated. *Id.* at 557.

The State mistakenly claims *Doe* is inconsistent with *Hewitt*. To the contrary, *Doe* is fully consistent with *Olim*, and therefore *Hewitt*. *Hewitt* did not expressly focus on the amount of allowable discretion. *Hewitt's* focus was on the requirement of "specific substantive predicates" and "repeated use of explicit mandatory language." 459 U.S. at 472. However, as stated above, just a short time after *Hewitt* this Court held "that a State creates a protected liberty interest by placing substantive limitations on official discretion." *Olim*, 461 U.S. at 249. Therefore, the holding in *Doe* requiring limitation but not elimination of discretion is consistent with *Olim* and *Hewitt*.

Therefore, the precise amount of official discretion allowable in this case is irrelevant. The WSP regulations eliminated discretion. *Mendoza*, 960 F.2d at 1429, 1432-33. To the extent, if at all, the regulations left a window of discretion, the opening fell within the perimeters of *Olim*. Accordingly, this Court should not grant certiorari on the issue of allowable discretion.

B. While Liberty Interests May Be Properly Defeated By Mere Procedural Regulations Or Boilerplate, Disclaimer Language, The Regulations At Issue in *Mendoza v. Blodgett* Contained No Such Language.

The State erroneously argues that *Hewitt* is applied inconsistently among the circuit courts because procedural regulations create liberty interests in some instances and not in others. Petition page 15-16. The State contrasts the holdings of the Seventh Circuit Court of Appeals in *Smith v. Shettle,* 946 F.2d 1250 (1991), with the Ninth Circuit Court of Appeals in *Mendoza v. Blodgett,* 960 F.2d 1425. Contrary to the State's assertion these two cases are consistent, even though at first glance they may appear to stand in opposition.

The Seventh Circuit in *Shettle* held that the procedural regulation which established a 30 day review procedure for administrative segregation did not create a liberty interest. While the Ninth Circuit in *Mendoza* recognized liberty interests in the procedural regulations for both visitation and dry cell watch, 960 F.2d at 1425, this holding is distinguishable from *Shettle* because the procedural regulations in *Mendoza* contain substantive predicates and mandatory language. The regulations dictate to prison personnel when and why an inmate is to be placed in Feces Watch or to be denied visitation.

Additionally, both holdings are consistent with *Hewitt*. *Hewitt* stands for the proposition that procedural regulations do not in and of themselves confer any liberty interest, but where the regulations go beyond simple procedural guidelines, the issue of state created liberty interest arises. 459 U.S. at 469-71. The review procedure in *Shettle* was a mere procedural regulation. In contrast, the regulations in *Mendoza* went beyond simple procedural guidelines in that specific criteria and mandatory language are contained in the regulations, thus creating a liberty interest. 960 F.2d at 1428-29, 1432-33.

As such, there is no confusion or inconsistency over whether "procedural regulations" grant liberty interests in some cases and not in others. *Shettle* and *Mendoza* are consistent with *Hewitt*. Accordingly, this is not a proper issue for which to grant certiorari.

The State raises yet another non-issue when it argues that confusion exists over the use of boilerplate language and disclaimers in prison policies. Petition page 16-17. The State notes that the Ninth Circuit found the absence of boilerplate, disclaimer language as relevant to the creation of liberty interests. Petition page 16-17. The State contrasts *Mendoza* with *Kentucky Department of Corrections,* 490 U.S. at 465, and *Williams v. Kyler,* 680 F.Supp. 172, 173 (M.D.Pa. 1986), *aff'd*, 845 F.2d 1018 (3rd Cir. 1988), in

which the existence of boilerplate, disclaimer language in the regulations defeated the creation of a liberty interest.

One wonders where the State finds confusion. The three cases are consistent with each other and with *Hewitt*. The focus is on the language used. The presence of boilerplate, disclaimer language gives discretion to officials and does not give an overall effect "such that an inmate can reasonably form an objective expectation". *Kentucky Department of Corrections,* 490 U.S. at 465. In contrast, the absence of boilerplate language or other disclaimer granting language is consistent with *Hewitt* and can create a liberty interest.

Thus, the State's contentions set forth above are irrelevant and mistaken. They do not require clarification by this Court because the confusion and inconsistencies the State worries about do not exist.

III. The Rule Set Forth in *Hewitt v. Helms* and *Kentucky Department of Corrections v. Thompson* is Not Limited to Prison Regulations Affecting the Duration of, or Release from, Confinement in Prison.

The rule of *Hewitt* and *Kentucky Department of Corrections* is not limited to prison regulations affecting the duration of, or release from, confinement in prison. As this Court stated in *Kentucky Department of Corrections:*

> The fact that certain state-created liberty interests have been found to be entitled to due process protection, while others have not, is not

> the result of this Court's judgment as to what interests are more significant than others; rather, our method of inquiry in these cases always has been to examine closely the language of the relevant statutes and regulations.

490 U.S. at 461.

In *Hewitt,* an inmate was confined to administrative segregation pending investigation into his role in a Pennsylvania State prison riot. In reviewing the inmate's due process claims under the Fourteenth Amendment, this Court indicated that it is normally reluctant to interfere in the everyday administration of a prison system, and that deprivations imposed in day-to-day administration are likely to be minor when compared to the "release from custody at issue in parole decisions and good-time credits." *Hewitt,* 459 U.S. at 470. Nonetheless, this Court concluded "in light of the Pennsylvania statutes and regulations here in question ... respondent did acquire a protected liberty interest in remaining in the general prison population." *Id.* at 470-71. This Court focused on the language used in the regulations. *Id.* at 472.

Kentucky Department of Corrections involved suspension of inmates' visitations rights. This Court stated that "state law may create enforceable liberty interests in the prison setting." 490 U.S. at 461. The opinion of this Court did not suggest that one type of regulation is more significant than another. Rather, this Court stated that "our method of inquiry in these cases always has been to

examine closely the language of the relevant statutes and regulations." *Id.* at 461.

Read together, *Hewitt* and *Kentucky Department of Corrections* recognize that regulations governing everyday prison administration procedures, such as administrative segregation, are relatively minor as compared with regulations governing what the State calls "duration of, or release from confinement" issues. Nonetheless this Court held in both cases that all regulations containing mandatory language and substantive predicates create liberty interests.

The State mistakenly argues that a bright line rule should now be established in which only those prison regulations which affect the duration of or release from confinement would be entitled to due process protection. Petition page 9. The only basis for the State's assertion is dicta contained in footnote 3 in *Kentucky Department of Corrections,* 490 U.S. at 461-62. The State suggests that regulations governing administrative segregation, dry cell watch, restrictions of visits to particular visitors, inmate placement, employment and other management issues should not be given due process protection unless a state clearly states an intent to do so. Petition page 20.

The self serving nature of this suggestion underscores its implausibility. If prisoners' liberty interests were solely dependent on state action, prisoners would be without

any real protection. Moreover, the bright line rule suggested by the State is unnecessary because the rule as set forth in both *Hewitt* and *Kentucky Department of Corrections* is clear. The focus is on the language of the statutes and regulations used: where they contain mandatory language and substantive predicates, a liberty interest is found. Both *Hewitt* and *Kentucky Department of Corrections* applied this rule to regulations which did not affect duration of, or release from prison.

A few of the federal appellate court cases which have applied the rule of *Hewitt* to non-durational/release issues and recognized a liberty interest include: *Gittens v. LeFevre,* 891 F.2d 38 (2d Cir. 1989); *Layton v. Beyer,* 953 F.2d 839 (3d Cir. 1992); and *Sheley v. Dugger,* 833 F.2d 1420 (11th Cir. 1987). *Gittens* involved regulations governing placement of an inmate in "keeplock", a form of administrative segregation in which an inmate who has misbehaved is confined to his cell, deprived of participating in the normal prison routine, and denied contact with other inmates. A disciplinary hearing must be held within seven days of confinement. 891 F.2d at 39. The court recognized a liberty interest because New York law used mandatory language ("shall") and required specific substantive predicates ("reasonable ground to believe inmate ... represents immediate threat to the safety,

security or order of the facility or immediate danger to other person or to property"). *Id.* at 40.

Layton v. Beyer involved placement of an inmate in restrictive custody. The substantive predicates of "threat to safety of others, a threat to property, or a threat to operation of a facility" together with mandatory language lead the inmate to form a reasonable expectation that he would not be confined in the Management Control Unit absent meeting the criteria. As such, the Third Circuit Court recognized a protected liberty interest. 953 F.2d at 846.

Similarly, regulations governing placement of an inmate in Close Management solitary confinement created a liberty interest in *Sheley v. Dugger*. The court likened administrative confinement to the facts of *Hewitt* in that an inmate could only be placed in administrative confinement for certain reasons ("disciplinary charges or criminal charges pending against inmate and presence in general population presents a clear danger"). Also, the regulation contained mandatory language ("shall be for shortest time possible" and "inmate shall be given opportunity to present his views"). 833 F.2d at 1424.

These few cases illustrate that, like *Hewitt*, regulations containing mandatory language and substantive predicates create a liberty interest even though they do not affect the duration of, or release from prison.

Some federal appellate courts have applied the rule of *Hewitt* to non-durational/release issues without recognizing a liberty interest: e.g., *Wallace v. Robinson*, 940 F.2d 243 (7th Cir. 1991); *Williams v. Armontrout*, 852 F.2d 377 (8th Cir. 1988), *cert. denied*, 488 U.S. 996 (1988); and *Dorman v. Thornburgh*, 955 F.2d 57 (D.C. Cir. 1992). These cases are all distinguishable from the instant case.

The court in *Wallace* refused to recognize a liberty interest because the prison regulation allowed transfer of a prisoner's work assignment for *any* reason except punishment. The court reasoned that the broad field of discretion an official had in transferring a prisoner's work assignment placed the regulation outside the ambit of *Hewitt*. 940 F.2d at 246-47.

In *Williams*, an inmate was placed in the Special Management Facility, a behavioral modification unit. The policy governing Special Management Facility requires that a committee review classification every 90 days. Following this classification meeting, the inmate is to be given reasons for his continued classification in the unit. *Williams*, 852 F.2d at 378. Consistent with *Hewitt*, the court looked for substantive predicates and mandatory language. The court held that the regulations did not contain substantive predicates, but were only mere procedural guidelines and thus did not create a liberty interest. *Williams*, 852 F.2d at 379.

The court in *Dorman v. Thornburgh,* 955 F.2d 57 (D.C. Cir. 1992) refused to recognize a liberty interest in regulations regarding the terms and conditions of prison employment because the regulations lacked mandatory terms. Prison officials possessed full discretion to set the terms and conditions of prison employment. *Id.* at 58.

The above three cases, consistent with *Kentucky Department of Corrections,* illustrate that: (1) the *Hewitt* rule is applicable to all regulations; and (2) where regulations to not contain either the substantive predicates or the mandatory language, or both, no liberty interest is created.

In summary, this Court has recognized that prison officials have broad administrative and discretionary authority over the institutions they manage, and that lawfully incarcerated persons retain only a narrow range of protected liberty interests. *Hewitt,* 459 U.S. at 467. Administrative segregation is the sort of confinement that inmates should reasonably expect to receive at some point in their incarceration, and it does not involve an interest independently protected by the Due Process Clause. *Id.* at 468. However, even with this underlying recognition, the focus of this Court has not been, nor should it be, on preferring durational/release issues over administrative segregation type issues. Rather, the focus has been on establishing the standard as to what establishes a state

created liberty interest through the content of the regulations themselves. The rule in *Hewitt v. Helms* is not dependent upon the subject matter that the statutes and regulations govern, but upon the plain meaning of the *content* of the statutes and regulations -- mandatory language and substantive predicates. Therefore, this Court should deny certiorari in this case.

CONCLUSION

For these reasons, respondent respectfully requests that this Court to deny the petition for a writ of certiorari.

RESPECTFULLY SUBMITTED this 2nd day of November, 1992.

MAUREEN E. LAFLIN, Esq.
MICHELLE M. EVANS
Legal Intern

Counsel for Respondent

I. AUTHORITY: RCW 69.50, RCW 9.94.049, RCW 9.94.041; DOC 421.110.

II PURPOSE: Feces watches are implemented to recover contraband believed, with reasonable suspicion, to be carried internally by an inmate. Approval for a Feces Watch must be obtained from the Superintendent or his designee with the rank of Captain or above.

III. APPLICABILITY: To all staff and especially to those Correctional Supervisors and employees who are involved in the search of inmates housed at the Washington State Penitentiary.

IV. DEFINITIONS:

Feces Watch: The placement of an inmate in a custody-locked cell, for the purpose of maintaining and inspecting at least (3) three consecutive normal bowel movements for contraband.

Reasonable Suspicion: Shall be individualized suspicion which is based upon specific objective facts in conjunction with rational inferences which Correctional Staff would be entitled to make based upon their judgment and experience and which reasonably warrants suspicion that an inmate is secreting contraband. Individualized suspicion shall be specifically directed to the person who is the target of the search, which will be documented.

V. POLICY: An inmate will be placed upon Feces Watch only upon determination that there is reasonable suspicion that a suspected inmate is currently secreting contraband. In cases where an inmate informant supplies information upon which "Reasonable Suspicion" is based, the past reliability or unreliability of the inmate informant shall be considered as well as the specificity of the information provided and whether the inmate has any advantage to be gained from providing the information. Feces Watch searches shall normally be concluded within 84 hours or after the equivalent of three normal bowel movements, whichever occurs first. In cases where the inmate has not had the equivalent of three normal bowel movements within the 84-hour period, 24-hour extensions may be authorized by the Superintendent or his designee with the rank of Captain or above until the inmate has had the equivalent of three normal bowel movements. In cases where there is specific and reliable information if the subject of the search is secreting contraband on his person by means of a method which would prevent the contraband from being passed after three normal bowel movements, or the equivalent thereof, then 24-hour extensions up to seven days from the beginning of the initial placement on Feces Watch may occur upon the authorization of the Superintendent ONLY. (Attachment A) In the event of no bowel movements or re-ingesting the contraband and the time limit may excede 7 days, the Director of Prisons may authorize 24-hour extensions as needed.

VI. PROCEDURE: To outline procedures which will enable staff at the Washington State Penitentiary to effectively monitor, recover and process contraband believed to be carried internally by an inmate.

A. Escort inmate to the Hospital from the place of the incident.

1. The inmate will be escorted in handcuffs by two (2) Correctional Officers to a custody locked cell in the Hospital, or to surgery if a body cavity search is required (follow procedures in I.O. 09.052). One officer will maintain control of the inmate, while the other officer walks behind the inmate. If the inmate is suspected of having placed the contraband in his rectum, particular attention should be given to the possiblity of him excreting it down his pant leg. The inmate's pant legs are to be tightly taped so no contraband can be lost.

2. Upon arrival in the custody locked cell, the handcuffs will be removed and one officer will strip search the inmate. The Shift Lieutenant/Sergeant will check the condition of the cell and mattress prior to occupancy and so indicate in the log. The second officer will place all of the inmate's clothing, except his shorts, in a plastic bag, attach an inventory slip provided by the Hospital and secure it in a place designated by Hospital staff.

3. Prior to placement, an inmate's medical record should be consulted for modalities. If present, medical staff should be consulted for need during the watch period. This will be documented in the log.

B. Officer and medical staff instructions for inmates placed on feces watch.

1. The Feces Watch Officer will be relieved at 4-hour intervals. The Shift Lieutenant/Shift Sergeant are to make at least one round during each officer's watch. The Feces Watch Officer will be provided with verbal instructions and a folder by the Shift Lieutenant which will contain the following:

a. I.O. 09.053 - Feces Watch Procedure
b. I.O. 09.052 - Body Cavity Search Procedures
c. I.O. 09.150 - Contraband Management
d. Two (2) evidence bags and four (4) evidence cards (more may be obtained if necessary)
e. Feces watch logs.

2. The cell is to be searched at least once per 8-hour shift. The Shift Sergeant is to assign the appropriate staff to accomplish this.

3. The cell temperature reading is to be taken twice a Shift and recorded in the Shift and Feces Watch Log. The cell temperature shall be no lower than 68 degrees Farenheit, and may be higher. If the Shift Lieutenant/Sergeant believes an insulated top is warranted one will be issued. If the inmate abuses the privilege, the top will be recovered.

4. While the inmate is restrained, he will be exercised for 15 minutes every four (4) hours. (This will be logged.)

5. A feces watch log will be completed by each feces watch officer. All blocks must be filled out completely. Information should include what the inmate says, if it could relate to the suspected contraband, how the inmate acts, what the inmate eats and drinks and the times, consistency and quantity of his bowel movements and urination.

6. The water in the custody locked cell will be turned off during the period of the feces watch. A bedpan and urinal will be provided when the inmate requests them. Feces will be thoroughly checked by the feces watch officer. If contraband is found, I.O. 09.150 -Contraband Management, will be followed. However, the feces watch officer may NOT leave the cell to contact the Shift Lieutenant or process the evidence until another officer relieves him. The same rule applies when the officer has to leave the cell for any other reason during his shift.

1

7. Feces and urine will be disposed by medical staff by flushing them down a toilet, other than the one in the cell in which the feces watch is taking place.

8. Normally the inmate will be attired in shorts only. A mattress on the floor is the only bedding provided. No sheets, pillows, pillow cases or blankets are to be provided.

9. The inmate is not allowed to have cigarettes, matches, mail, reading materials or any other personal articles.

10. No telephone calls or showers will be permitted.

11. At the following listed times each day the inmate will be provided access to the listed hygiene items:

    a. Access Period:
        1. 6:15 AM to 6:30 AM (Breakfast)
        2. 10:15 AM to 10:30 AM (Lunch)
        3. 3:30 PM to 3:45 PM (Dinner)
        4. After any bowel movement

    b. Hygiene Articles:
        1. One (1) Wash Cloth
        2. One (1) Face Towel
        3. One (1) Bar Soap
        4. One (1) Toothbrush and sufficient tooth powder to brush his teeth.
        5. One (1) Wash Basin

At the end of the allotted time, all hygiene articles will be returned to the medical staff. The Feces Watch Officer shall log the availability of these items and shall note whether or not the inmate used any or all of them.

11. The Feces Watch Officer is not to take his eyes off the inmate at any time. The inmate's hands are to be kept in plain sight at all times.

12. Failure to follow this procedure will result in disciplinary action.

VI. REVIEW:

A. This Order will be reviewed annually by the Superintendent or his designee for update and/or any required modifications.

B. When there is any modification or change to this procedure, it will be sent for review and approval by the Deputy Director.

C. This Order will become effective immediately on date of Superintendent' signature.

1

APPROVED: _____ DATE: 28oct88
Superintendent, Washington State Penitentiary

DEPARTMENT OF CORRECTIONS

INSTITUTIONAL POLICY AND PROCEDURES

POLICY NUMBER	PAGE
16.020	1 of 11

REFERENCES
DOC 420.100
ACA 2-4338, 2-4369 thru 2-43
WAC 137-44-005 thru 135
CSB 16.10 thru 16.15

CHAPTER	SUBJECT
COMMUNICATION, MAIL AND VISITING	INMATE VISITING

I. AUTHORITY: Policy Directive 420.100.

SCOPE: Each visiting location at Washington State Penitentiary will have a Procedure Manual detailing visiting within their location.

II. PURPOSE: To set forth a policy and establish regulatory procedures for administering the visiting program and to provide an effective visiting program that will enhance rehabilitative efforts, establish a normalization of social relationships, and satisfy security requirements of this facility.

III. APPLICABILITY: To all inmates and personnel of the institution, and especially to the appropriate Associate Superintendent, and Visiting Room Staff.

III. DEFINITIONS:

A. Container Search: An inspection of items brought into a facility by visitors including, but not limited to a search of briefcases, handbags, lunch boxes, envelopes and other items. Such searches may be conducted absent any reasonable suspicion or on a random basis.

B. Contraband: For purpose of this policy, contraband is defined as any unauthorized item which a correctional facility prohibits from possession by offenders on institution grounds or within the secure perimeter of the facility and any unauthorized item which may not be legally possessed by a visitor or offender on the grounds or within the perimeter of a correctional facility including, but not limited to any explosive, any deadly weapon as defined by RCW 9.94.043, any drug as defined by RCW 9.94.045, any controlled substance as defined in Chapter 69.50 RCW, and any alcoholic beverage.

C. Electronic Search: A scan of the personal effects and the clothed body of an individual by use of a hand-held or stationary metal detector or electronic viewing device.

D. Locker Search: Lockers are the property of the Department of Corrections, which may be made available for the convenience of visitors. The facility shall maintain a key for all lockers and may inspect them absent any reasonable suspicion or on a random basis

E. Pat Search: Patting the hands down the clothed body of a visitor. Such searches may be conducted absent any reasonable suspicion on a random basis.

F. Reasonable Suspicion: A reasonable suspicion is one based on specific objective information along with all the rational inferences the authorizing official is entitled to draw from the information, in light of that official's experience, that the visitor may possess contraband. Some factors which can be considered in determining reasonable suspicion include:

1. The nature of the tip or information

2. The reliability of the informant

3. The degree of corroboration

4. The response of the search dogs

5. Other facts contributing to suspicion or lack thereof, such as contraband discovered or other pertinent information revealed by a pat, electronic, strip or other search.

G. Strip Search: A search of all of a visitor's clothing and the visual examination of the visitor's naked body, including the mouth and the areas between the fingers and toes and under the armpits and soles of the feet. Such searches may be conducted only on reasonable suspicion to believe a visitor possesses contraband on his or her person.

H. Vehicle Search: An inspection of any vehicle entering the grounds or perimeter of a correctional facility including, but not limited to looking under the hood, under seats, into glove boxes, into the trunk and a container search of all items transported in the vehicle. Such searches may be conducted without reasonable suspicion the visitor is transporting contraband and on a random basis.

I. Visitor: For purposes of this policy a visitor is defined as any person who enters the grounds or perimeter of a correctional facility who is not a correctional employee as defined in Policy Directive 420.120.

J. Use of Canines: All searches which can be conducted on a random basis may be aided by trained dogs only with authorization of the Superintendent or his designee.

V. POLICY:

A. This Policy will be reviewed with inmates during orientation. A copy of the document will be made available or posted in the following areas: Visiting Room, Information Desk, Inmate Library and Inmate Living Units.

B. The number of visitors an inmate may receive and the length of visits shall be limited only by the institution's schedule, space and personnel requirements. Inmates shall not be denied visitation with persons of their choice except:

1. Persons associated with him in the comission of the offense for which he was incarcerated.

2. Minor children who are identified as victims of sexual molestation by the inmate.

3. Parolees and probationers under supervison unless authorized by the Superintendent or his designee.

4. Ex-offenders unless authorized by the Superintendent or his designee.

5. Persons under 18 years of age may not participate as a member of a group visiting within the security perimeter of the institution.

C. This institution shall provide a visiting room for inmates and their guests that allow ease and informality of communication in a natural environment. It shall be arranged with the comfort and privacy of the visitor in mind, and to allow for socially acceptable physical contact during visiting.

D. VISITING HOURS:
Visitors will not be allowed on Institutional grounds earlier than one-half hour (30 minutes) prior to the processing for the area they are visiting.

1. MAIN INSTITUTION: Visiting days are rotated by inmate housing assignments. Schedules are posted in the Units and copies are on file at the Information Desk.

Wednesday through Sunday	12:30 p.m. to 3:30 p.m. 5:30 p.m. to 8:30 p.m.
Processing closes at:	2:30 p.m. & 7:00 p.m.

2. MEDIUM SECURITY COMPLEX (MSC):

Wednesday through Thursday	5:30 p.m. to 8:00 p.m.
Friday, Saturday, and Sunday	12:30 p.m. to 3:30 p.m. 5:30 p.m. to 8:00 p.m.
Processing closes at:	2:00 p.m. & 6:30 p.m.

3. MINIMUM SECURITY UNIT (MSU):

Wednesday through Saturday	5:30 p.m. to 8:30 p.m.
Saturday and Sunday	8:00 a.m. to 10:30 a.m. 12:30 p.m. to 3:30 p.m. 5:30 p.m. to 8:30 p.m.
Processing closes:	9:30 a.m., 2:30 p.m. and 7:00 p.m.

4. INTENSIVE MANAGEMENT UNIT (IMU): By appointment only.

5. There will be no visits scheduled for Monday and Tuesday.

E. NUMBER OF VISITORS:

1. Limitations on the number of visitors who can visit an inmate at one time is ten persons to include children.

2. Further limitations on the number of visitors may be imposed to eliminate difficulties in supervising the visit.

F. PARKING:

1. All vehicles must park in the designated area posted for visitors in the lower lot below the entrance to the Main Gate.

2. Handicapped parking visitors can be let out of the vehicle in front of the visitor entry and the vehicle removed by a person accompanying them.

   Prior arrangements must be made one hour in advance of visits if the visitor is to be picked up by staff in a State vehicle in the parking lot. Notify Public Access Sergeant for arrangements.

3. Vehicle Search: A vehicle search may be conducted absent any reasonable suspicion that the visitor is transporting contraband or on a random basis. The visitor shall be present during such a search unless ownership of the vehicle cannot be established or there is a basis for proceeding with the search.

G. VISITOR ENTRY INTO INSTITUTION:

1. At the Main Gate, all visitors shall be required to properly identify themselves with legal picture identification, state they intend to visit, then walk directly to the Information Desk.

2. Unauthorized items will be put in lockers provided at the Main Gatehouse.

3. Items permitted in Visiting Area: Three (3) keys, $2.00 in coin for visitor and $2.00 in coin for inmate, legal picture I.D., clothing and diapers for infants.

4. All lockers are subject to search and may be inspected absent any reasonable suspicion or on a random basis.

5. No admission into the institutional grounds except by approved routes to and from the visiting area (area-posted Visitor Entry).

H. PROCESSING AT THE INFORMATION DESK:

1. Produce legal picture I.D. - All identification cards must be current and legal (Driver's License, State I.D. or Passport).

2. Register on the Visitor Registration Form provided for this entry. This form includes the name and address of the visitor, the relationship to inmate and the date of visit.

I. SEARCH OF VISITORS:

1. A large sign is posted in the Lobby stating "All Visitors are Subject to Search Prior to Being Allowed to Visit any Inmate."

2. All visitors shall be searched by a Metal Detector scanning device and pat searched.

3. If contraband is found on the person or in the clothing of a visitor, a full and complete Telephone Incident Report shall be submitted, the contraband confiscated and the visitor detained for law enforcement officials, if drugs or a weapon are found.

4. The visitor's refusal to be searched shall be sufficient cause for denial of visit.

5. Search procedure for Infants in Diapers:
All infants will have their diapers removed by the accompanying adult. The child will be placed in a thin material garment covering the area previously covered by the diaper. This procedure will be accomplished in the privacy of the search area. A search will be conducted on the child and adult along with all hand-carried items after the changing of the clothing. The officer will step out of the search area after conducting the search while the infant is re-clothed in a diaper. The officer will conduct another search of the room, hand-carried items and all visitors before visiting will proceed.

6. All containers, packages and hand-carried items which are authorized are subject to search.

7. Strip Search - A strip search will only be considered based on reasonable suspicion the visitor possesses contraband. A strip search must be authorized in writing by the Superintendent or his designee before the search can be performed. After it has been authorized, the visitor will be asked to consent in writing to the strip search. No strip search will take place without proper authorization. If the visitor refuses a properly authorized search, the visitor will be promptly escorted out of the facility or turned over to local law enforcement authorities. A refusal to be searched may be cause for future visiting restrictions as determined in individual situation. The strip search must be carried out in a private area by an employee of the same sex as the visitor being searched.

J. VISITORS DRESS STANDARD AND PROPERTY REGULATIONS:
The following standards are set forth for all visitors entering the institution:

1. Infants (babes in arms) may be clothed in diaper only, and any other garment commensurate with weather and temperature.

2. Children under six years of age may be dressed in sunsuit, shorts, or short pants, and similar clothing commensurate with weather and temperature.

3. Adults and children of six years or older - All clothing must be clean and presentable.

a. Clothing and Property Allowed:

1. Transparent blouses/dresses with slip/camisole. Cardigan hip-length sweaters are permitted in the visiting room as long as they are worn. If taken off in the Visiting Room, it is a violation of the visiting rules and will be handled accordingly.

2. Open footwear, such as sandals, is allowed. Only footwear that can be readily searched may be worn. Footwear must be worn at all times.

b. Property:

1. Picture identification card (Driver's License, State Identification Card or Passport), two car keys (door and ignition and one house key.

2. Visitors with children may bring one quiet small toy (non-metal).

3. Only visitors with children in diapers may bring the following items: Four (4) diapers, two (2) plastic bottles and a small "receiving type" blanket, no quilted blankets allowed. All items to be brought in a plastic sack to be readily searched. All clothing of children under six years of age must be able to clear a metal detector.

c. Clothing and Property NOT ALLOWED:

1. Clothing not allowed:

a. Dresses/blouses without sleeves, bare mid-riffs, extremely low-cut or backless, sheer clothing, cut-offs or shorts, dresses/shirts with slits, wrap-around and open button closures. Hemlines will be no shorter than one inch above the knee. All bib attire, jackets and unlined shirts or tops used as a jacket. Pockets in all garments must be complete (no openings). Any item which cannot be readily searched. Shoulder pads, tops which are not hip length, pants with banded ankle straps.

b. Headgear of any kind is prohibited. This includes, but is not limited to: Scarves, hats, caps, wigs, hairpieces, flowers, etc. The only exception is someone who must wear headgear for medical reasons. This person must produce a medical statement from his or her doctor. However, the headgear must be removed and searched by the Search Officer each visit.

c. Visitors are not allowed to wear coats, jackets, hooded sweatshirts, windbreakers, leg warmers, etc., into the Visiting Room. These must be hung in the coat rack provided in the Visiting/Reception Area.

d. Pants must be worn outside of ankle or long boots. Long boots must be taken off every time the visitor is processed. Boots which cannot be readily searched [illegible] are not permitted

2. Property Not Allowed:
   a. Paper currency (U. S. or Foreign), checks, money orders, credit cards or other negotiable instruments, cigarettes, pictures, letters of unauthorized items.

   b. Stuffed toys, games, crayons, puzzles, toy guns or knives and any other property not listed in the Property Allowed Section.

3. Due to changing fashions and security requirements, additonal instructions/limitations may be applied. Notice of these changes will be posted in the Visiting/Information Area, Inmate Library and made available to counselors. Policies will be updated as required.

K. VISITING ROOM BEHAVIOR AND RULES: (See Schedule A.)

VI. PROCEDURES:

A. List of approved Visitors

1. Each inmate shall submit to his Unit Counselor, a list of names and addresses of proposed visitors. Staff shall approve persons for an inmate's Visiting List in accordance with the following guidelines:

   a. List of approved visitors (only visitors who have completed the attached questionnaire and have been approved for visiting). (Schedule B)

   b. All persons under the age of 18 or over the age of 16 may be placed on an inmate's Visiting List by submitting a notarized signature from the legal guardian on the original Visiting Questionnaire.

   c. All inmates are allowed ten (10) persons on the Visiting List (married couples, Mr. and Mrs. will not be counted as one visitor).

   d. Parolees and Probationers (not under supervision) unless authorized by the Superintendent or his designee.

   e. All children must be accompanied by their parent or legal guardian. Any exceptions must be arranged through the inmate's Counselor.

   f. Visitors may only be on one Approved Visiting List at a time, except as provided in Section VI, Paragraph C, 5., b.

2. The inmate shall be given a copy of his Approved Visitors List upon request to his assigned Counselor.

3. When an individual is not approved, notice of, and reasons for the exclusion shall be given to the inmate who submitted the individual's name. The inmate may appeal the decision to the Superintendent or his designee.

4. Attorneys shall schedule visits to their clients at least 24 hours in advance, and will be admitted to the institution during regular working hours after presenting proper credentials and identification. They should be registered into the institution and be subjct to search procedures and all other rules and regulations of the institution.

   a. Attorney Provided Information:
      1. The Attorney's or Legal Aides' name

      2. Date and time of interview

      3. Inmate's name and DOC number

      4. Inmate's housing assignment

   b. All conversations between inmates and attorneys may be visually observed by supervising officers, but not overheard, recorded or listened to in any manner. All reasonable precautions shall be taken to preserve the confidentiality of the attorney/client relationship.

5. If a Special Visit is approved for inmates in Disciplinary Status, the visit shall be held in the No Contact Visiting Area.

6. Visits for inmates in the Hospital and/or medical isolation shall require the approval of the Health Care Manager. Depending upon the seriousness of the illness, visits for hospitalized inmates may be held in either the Hospital or the Visiting Area. If the inmate is able to walk to the Visiting Room, the visit will take place with population. Visits to inmates confined to the Medical Isolation Unit shall be conducted in the Hospital.

7. Visits for inmates confined to public (downtown) hospitals are not permitted, except by order of the Superintendent or his designee. Such visits shall be authorized only when the inmate's medical condition is deemed to be life threatening and shall be conducted under heavily supervised security conditions.

B. Frequency of Visits: Visits for the inmate population assigned to the Main Institution are rotated according to Units, Wednesday through Sunday, allowing for visits every third day for each Unit.

Visiting days and hours for the Medium Security Unit and Intensive Management Unit will be governed by the visiting procedures outlined in the Operational Procedural Manuals of those Units.

C. Termination & Suspension of Visits:
1. A visit may be denied or terminated and visiting privileges suspended under the following circumstances:

   a. Visitors under the influence of drugs or alcohol.

   b. Insufficient space available.

c. Refusal of visitor to submit to search procedures.

d. Refusal or failure to produce sufficient identification or the falsifying of identifying information by visitor.

e. Violation of institutional visiting rules by visitor.

f. Failure to prevent children from disturbing other persons in the Visiting Area.

g. Excessive physical contact or sexual activity by the visitor or inmate. On Contact Visits, an inmate and visitor may embrace or kiss briefly at the beginning and end of the visit. An inmate and visitor may hold hands during the remainder of the visit. These contact restrictions shall not apply to small children.

h. Other reasons for denying, terminating or suspending a visit as reasonably necessary to preserve the security of the institution and reasonable order in the Visiting Area.

i. Abusive language to staff and other visitors.

j. Any behavior that is offensive or disruptive.

2. Based on the information provided by staff, the inmate and/or visitor, the the Superintendent or h designee may remove an individual's name from an Approved Visiting List for a specified period, indefinitely or permanently. A written notice of the decision shall be given to the inmate and to the visitor. The statement of reasons may be deleted or limited in details.

3. A person shall not be denied permission to visit solely because of sex, marital status, status as an ex-offender, or having visited another inmate.

4. Visiting privileges shall be denied only by orders from the Superintendent or his designee. When the suspension is imposed as part of a formal disciplinary proceeding, the Superintendent or his designee will have final approval. (Visiting may be suspended as a disciplinary sanction only when the offense specifically involves visiting.) A visitor who has had his/her visiting privileges suspended may submit written statements in opposition to the suspension.

5. Visitors may be removed from one inmate's Visiting List and placed on another when adequate justification is shown. The visitor must complete a new set of Visiting Forms and it must include a statement of the reason for the change. If, for any reason, a visitor is removed from a Visiting List by the inmate, they cannot be authorized to return to that inmate's Visiting List for six (6) months from the effective date of removal.

a. A visitor may apply no more than three times. Any request beyond the third time or any request not accompanied by adequate justification will be denied.

b. When a visitor or prospective visitor has more than one inmate who are immediate family members, the visitor may be on each of the inmate's Visiting List. Immediate family is defined as and limited to parents, stepparents, brothers, sisters or stepbrothers or sisters, children, stepchildren, grandparents. In this case, each inmate must complete and mail a separate Visiting Questionnaire to his immediate family.

c. In an indefinite suspension, the notice shall include a date when reapplication for visiting privileges may be made on behalf of the visitor.

D. Special Visits: Special Visits may be granted on a one-time basis where there is a special need which cannot be satisfied through normal procedures.

1. Special Visits by persons not on the Approved Visiting List, including prospective employers, sponsors, parole advisors or immediate family members traveling a long distance, shall be authorized by the inmate's Counselor, Correctional Unit Supervisor and Correctional Program Manager. These persons may be able to offer valuable assistance to inmates and shall be allowed to visit whenever possible.

2. Special Visit requests by persons on the Approved Visiting List must meet the following criteria:

a. They should not have visited within the last six months prior to the request of the visit.

b. The visitor should be coming from a distance of at least 300 miles. This does not mean a Special Visit will be based on distance alone. There must be a specific need related to the visit which cannot be satisfied on a normal visiting day for that Unit.

c. A local visit must be able to demonstrate significant and verifiable need. Normally, a local visitor will not be approved for a Special Visit.

d. Any Special Visits in conjunnction with regular visiting days shall not be approved automatically. There should be no population visits approved on Protective Custody days.

e. Any Speial Visit requested for a non-visiting day must be approved by a Correctional Program Manager, Captain, Duty Officer or higher.

f. Special Visit Request Forms will be approved or denied by the Counselor, Correctional Unit Supervisor and Correctional Program Manager, and delivered to the Information Desk Officer (Regular Visiting Days.)

g. At the Medium Security Complex, all Special Visits must be approved by the Correctional Program Manager.

E. Special Review/Consideration of Visiting: Any inmate or visitor may submit a letter of special consideration for review of visitation rights for any situation not covered in this policy. Such letter should be submitted to the Superintendent or his designee.

VII. REVIEW:

A. This order shall be reviewed annually by the Superintendent or his designee.

B. If there are modifications or changes they will be forwarded to the Deputy Director for review and approval.

APPROVED: _____ /DATE: 17 May 88
Superintendent, Washington State Penitentiary

APPENDIX C

WASHINGTON ADMINISTRATIVE CODE

WAC 275-80-930 Suspension of visiting rights--Duration. Visiting rights may be suspended for a single visitor or all visitors of a single resident depending on the seriousness of a visiting infraction. The visiting rights of a resident charged with violation of visiting rules may be suspended only after a finding of guilt pursuant to a regualr disciplinary hearing and such rights may be abridged for a maximum duration of 90 days after which visiting rights shall be restored unless there remains a clear and present, or imminent danger to the health and safety of any visitor, resident, or staff mamber.

[Order 814, Section 275-80-930, filed 6/28/73.]

NO. 92-579

IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1992

JAMES BLODGETT, GARY EDWARDS,
EDITH JONES, RON VAN BOENING,
JACK LAMBERT, AND LAWRENCE KINCHELOE,

Petitioner,

V.

ROGACIANO GONZALES MENDOZA,

Respondent.

CERTIFICATE OF SERVICE

I, Maureen E. Laflin, a member of the Bar of this Court, hereby certify that on this 2nd day of November, 1992, one copy of Respondent's Brief in Opposition in the above-entitled case was mailed, first class postage prepaid, to Kathleen D. Mix, Sr. Assistant Attorney General, Attorney General's Office, Corrections Division, P.O. Box 40116, Olympia, WA 98504-0116, counsel for all the petitioners herein. I further certify that all parties required to be served have been served.

Maureen E. Laflin
University of Idaho
College of Law
Legal Aid, Room 10
Moscow, Idaho 83843
(208) 885-6541
Counsel for Respondent